ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

WILLIAM WAYNE GILBERT

Petitioner,

vs.

STATE OF NEW MEXICO,

Respondent.

83-5943

~~83-5953~~

No.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW MEXICO

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Whether the defendant's confession was improperly admitted where it was obtained as a result of an illegal detention by the investigating officers who detained defendant and questioned him concerning the murder for which he was convicted and received the death penalty when the officers lacked probable cause to detain the defendant and the defendant had made arrangements to post bond or bail on the charge for which he was originally arrested?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

William Wayne Gilbert respectfully petitions this Court to review a judgment of the Supreme Court of New Mexico. The judgment affirmed his two convictions of murder and his sentences of death.

CITATION TO OPINION

The opinion of the New Mexico Supreme Court is unpublished and the slip opinion (No. 13,443) is attached to this petition as Appendix "A." Prior to this case, petitioner was also convicted of two other offenses of murder growing out of the same confession and the opinions of those cases have been published at State v. Gilbert, 98 N.M. 530, 650 P.2d 814 (1982); State v. Gilbert, ___ N.M. ____, 657 P.2d 1165 (1982). (Hereinafter referred to as "Gilbert I and "Gilbert II".) The New Mexico Supreme Court uses the same set of facts in every case to determine that the confession was properly admitted.

JURISDICTION

The judgment sought to be reviewed was filed October 17, 1983. Rehearing was not requested. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

STATUTORY PROVISIONS AND CONSTITUTIONAL PROVISIONS

The constitutional provisions relied on by petitioner are the Fourth, Eighth and Fourteenth Amendments to the United States Constitution.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

1. STATEMENT OF THE CASE

The New Mexico Supreme Court opinion in this case, No. 13,443, filed October 17, 1983, simply refers to the facts and reasoning of Gilbert I on the issue of defendant's detention and suppression of his conviction. The following facts are taken from that opinion unless cited to the record in this case (references attached hereto as Appendix "B").

William Wayne Gilbert was arrested at 4:30 a.m. on January 19, 1980, based on an incident in which shots were fired in a sandwich shop on January 18, 1980. He was advised of his Miranda rights on arrest. He was charged with aggravated battery and booked at about 7:30 a.m., in connection with this incident. At 8:30, he contacted a bondsman and made arrangements to meet his $10,000.00 bond. An employee of the bondsman arrived at the jail at 9:30 to arrange for defendant's release. For unspecified reasons, the police delayed the release of defendant at 9:30. At that time, defendant had not spoken to the police regarding any matter other than the shooting at the sandwich shop, and he had not

been charged with any offense other than the aggravated battery. (Appendix "B")

During the day of January 18, 1980 the police had developed the name of petitioner as a possible suspect in the Johnson murders involved in this case, but the record does not disclose how the police developed that lead or whether the lead was from a reliable source. (Appendix "B")

At 10:30 a.m., homicide Detectives Nese and Jasler first became aware that defendant had been arrested in the sandwich shop incident. (Appendix "B") They arrived at the jail, read defendant his Miranda rights, and began to question him. (Appendix "B", p. 2) When this questioning turned to the murders of Kenn and Noel Johnson, defendant asked to speak to an attorney, clearly invoking his Miranda rights. According to the testimony of the defendant, he contacted an attorney, told the attorney he was being charged with aggravated battery and was ready to make his bond, and told him he was being questioned regarding a murder. (Tr. Vol. IV, p. 675) The attorney advised him not to talk to the officers, and made an appointment for the defendant to come to his office on Monday morning. (Tr. Vol. IV, p. 721)

The detectives spoke to the attorney, and apparently agreed not to question the defendant further, but received the attorney's consent to take physical evidence such as fingernail scrapings and photographs. (Tr. Vol. IV, p. 578, p. 1106; Brief in Chief, p. 6)

Despite this agreement, defendant was questioned about the Johnson murder scene by the officer taking his fingernail scrapings who had been present at the investigation of that scene. While this evidence was taken, the homicide detectives "learned" that the body of Carol Gilbert, defendant's wife, was found in the Gilbert home. The opinion in Gilbert I does not say how this evidence was "learned," nor whether the source of the information was reliable. The homicide detectives, upon next seeing Gilbert, told him they had this information, and told him "the ballgame is up," and that sooner or later defendant would have to do something. Defendant then told the detectives if they would leave him alone for an hour, he would talk to them on their return. The opinion

states that "murder" charges were filed against the defendant at 1:30 p.m., about the time of this exchange. The opinion does not say which murder or murders defendant was then charged with.

At about 2:30 p.m., the detectives returned and took Gilbert to an interview room at the jail. Defendant stated that he should call his attorney. When the detectives indicated that he could use the telephone, defendant responded that the attorney would advise him to say nothing. Despite this invocation of the right to counsel, the detectives proceeded to question the defendant. Gilbert confessed to two murders which the police were unaware had occurred.

Gilbert was then moved to the police station, where he again stated that he should call his attorney. When the detective again offered the telephone to defendant, he made the same response that his attorney would advise him to say nothing. The detectives continued the questioning, and defendant confessed to the killing of his wife, the Johnsons, Barbara McMullen, and two other people.

These confessions were introduced against defendant in Gilbert I (Barbara McMullen), Gilbert II (Carol Gilbert), and the present case, the killing of the Johnsons. In each of the earlier cases, defendant was convicted and sentenced to life imprisonment. He did not appeal those convictions beyond the State Supreme Court level. In this case, the confession was again introduced against the defendant, and he was convicted and sentenced to death.

Each of the New Mexico Supreme Court opinions refers to the findings of fact and conclusions of Gilbert I. In Gilbert I defendant challenged the admission of the confessions because they resulted from his illegal detention. He pointed to the delay between 9:30 a.m., when he was ready and able to post his bond for aggravated battery, and 1:30 p.m., when he was charged with murder. He challenges this detention, both in Gilbert I and here, as lacking in probable cause.

In the opinion in Gilbert I, the New Mexico Supreme Court held that probable cause for the detention existed. The court based this determination solely on these facts as noted in that opinion: (1) That the police "received information on January 18 that defendant had been in the Johnson home the night Kenn and Noel Johnson were murdered"; and (2) That the incident leading to Defendant's arrest was "somewhat bizarre," based on the facts that defendant was wearing "combat fatigues," carrying "many rounds of live ammunition and a rifle" when arrested.

Gilbert I does not state any more about the "information" that defendant was in the Johnson house on the night of the murder. Specifically, it contains no facts regarding the source of this information, its reliability, its credibility, its detail, or any facts regarding the information or the informant. The facts regarding the circumstances of the aggravated battery incident are totally unrelated to any of the charges of murder. The court does not explain how the "bizarre" nature of that incident contributes to the probable cause to believe that defendant had committed murder.

The court also notes that the police learned that the body of Carol Gilbert was found in the Gilbert home "soon after" the defendant contacted his attorney. That time must have been after the questioning began at 10:30. The court states that this fact established probable cause to detain defendant for a third murder. The court does not say how this information legitimizes the detention for more than an hour before it was received. The court also does not cite any further information regarding the finding of Carol Gilbert's body, such as the reliability of the source or the credibility of the informant.

II. THE APPEAL

On appeal, the petitioner contended that the confession secured by the police was the result of an unlawful detention because he was prepared to post bond at 9:30 a.m. on the date of his arrest for assault when the police, without probable cause, detained him and began

questioning him for murders with which he was not charged and of which the police had no probable cause to suspect him. (Brief in Chief, p. 15) He claimed that this four hour detention from the time he was ready to bond out at 9:30 to 1:30 when he was arrested for the murders involved in his three convictions was in violation of his right, under the Fourth Amendment, to be free of unreasonable seizure or restraint of his person. (Brief in Chief, pp. 15-16)

Defendant argued that, derivative evidence, whether direct or indirect, must be suppressed when obtained as the result of illegal police conduct. Id. at 17. And evidence of confessions which have been obtained as the result of arrest without probable cause must be suppressed as "fruits of the poisonous tree," absent attenuation or intervening circumstances. Id. at 17.

Relying on the rationale expressed in petitioner's two prior murder convictions, the Supreme Court held that no error was committed with regard to admitting petitioner's confession. (slip opinion at p. 2) In Gilbert I, the New Mexico Supreme Court held that there was no illegal detention because the police had probable cause to make an arrest at 9:30 a.m. when defendant was detained. But the court does not state what information was sufficient to amount to probable cause when the only information the police had at that point was that defendant had been in the Johnson home the day of the murder. Nor does the court explain how it concludes that this was probable cause without first establishing that the information the police had was reliable.

III. ARGUMENT FOR ALLOWANCE OF THE WRIT OF CERTIORARI

The facts in this case establish that at 9:30 a.m. on January 19, 1980, the police were prepared to release defendant on bond on the charge of aggravated assault committed at the sandwich shop on the night of January 18, 1980. Throughout the trial in this case and the prior trials, petitioner has contended that from 9:30 a.m. when he was about to be released on bond, the police did not have probable cause to arrest or otherwise detain him.

The New Mexico Supreme Court's opinion in Gilbert I held that the police had probable cause to arrest petitioner by the morning of January 19, 1980, because the police somehow had developed that petitioner had been at the Johnsons' home prior to the murder. However, the state supreme court does not state the rationale for its conclusion that Petitioner's possible presence at the Johnsons' home would have risen to the level of probable cause to arrest or to refuse to allow petitioner to post bond on the totally unrelated charge upon which he had been held.

Throughout all proceedings in this case, petitioner has argued that the facts involved here were governed by Dunaway v. New York, 442 U.S. 200 (1979), in which this Court held that seizure of a defendant by taking him involuntarily to a police station for questioning merely because the police had a reasonable suspicion that he possessed intimate knowledge about a serious and unsolved crime violated the defendant's rights under the Fourth Amendment. Any confession given by defendant after the arrest without probable cause tainted the confession subsequently given by him even after an otherwise proper Miranda warning. Such tainted confession was inadmissible where there were no intervening events which broke the connection between the illegal detention and the defendant's confession.

Since defendant's trial, this Court has decided Taylor v. Alabama, _____ U.S. _____, 102 S.Ct. 2665 (1982) which has reasserted the principles enunciated in Dunaway and in Brown v. Illinois, 422 U.S. 590 (1975). In Taylor, the same problem presented in this case and in Dunaway was again before the Court. Taylor had been arrested without a warrant or probable cause. The sole basis for detaining defendant was an uncorroborated informant's tip. Taylor was taken to the police station, given his Miranda warnings on various occasions and allowed to meet with his girlfriend and a friend. Six hours later he confessed to the robbery which led to his conviction and appeal. The Alabama Court of Appeals reversed the conviction, holding that the confession should not have been admitted. The Alabama Supreme Court reversed the Court of

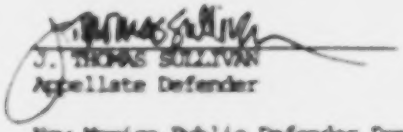
Appeals. This Court granted defendant's petition for writ of certiorari and, after review, held that Dunaway was controlling in spite of the state's contention that the six hour interval between the illegal detention and the confession, combined with the Miranda warnings, the visit by defendant's girlfriend and the absence of flagrant behavior by the police attenuated or intervened to break the connection between the illegal detention and the defendant's confession.

Here the detention of petitioner was based on nothing more than the belief of the police that defendant had been at the Johnson home before the murder. Petitioner respectfully submits that this vague suspicion of the police does not rise to the level of probable cause to detain defendant. The detention deprived petitioner of his right, under the Eighth Amendment, to be released on reasonable bond and his right, under the Fourth Amendment, to be free of seizure on less than probable cause. The only possible conclusion is that the detention, with these facts, tainted the subsequent confession as the fruit of the poisonous tree. See, Wong Sun v. United States, 371 U.S. 471 (1963). The state failed to carry its burden of proving that the confession had been purged of the taint of illegal arrest and was thus admissible.

CONCLUSION

For the foregoing reasons, William Wayne Gilbert respectfully petitions this Court to issue its writ of certiorari and review the judgment below.

Respectfully submitted,



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IN THE SUPREME COURT OF THE UNITED STATES
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APPENDIX A

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs. No. 13,443

WILLIAM WAYNE GILBERT,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

Richard B. Traub, District Judge

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OPINION

STOWERS, J.

Defendant William Wayne Gilbert was tried by jury and convicted in the District Court of Bernalillo County for two counts of kidnapping in the first degree with firearm enhancement, two counts of criminal sexual penetration in the second degree with firearm enhancement, and two counts of first degree murder with aggravating circumstances. The victims of the crimes charged were Kenn and Noel Johnson. For the murder of Kenn Johnson the jury found the aggravating circumstance of NMSA 1978, Section 31-20A-5(B) (Repl.Pamp.1981). For the murder of Noel Johnson the jury found the aggravating circumstances of NMSA 1978, Sections 31-20A-5(B) and (G) (Repl.Pamp.1981). The jury unanimously agreed that Defendant be sentenced to death for each of the three aggravating circumstances. Defendant was sentenced to eighteen years plus one year on each count of kidnapping, and nine years plus one year on each count of criminal sexual penetration. These sentences were to run consecutively. Based on the jury's finding of aggravating circumstances, Defendant was sentenced to death for each count of first degree murder.

Several of the issues raised have been settled in other opinions from this Court, but in the interest of completeness we will dispose of all points raised in this appeal.

CONFESSION

Failure to Suppress Defendant's Confession.

Defendant was arrested on January 19, 1980, following an incident involving gunfire at the American Sandwich Shop in Albuquerque. Later that day Defendant confessed to six murders including those of Kenn and Noel Johnson. The chronology of events, Defendant's claims, and our decisions on the issues are set out in detail in State v. Gilbert, 98 N.M. 530, 650 P.2d 819 (1982). In that case

Defendant appealed from his conviction for the murder of Barbara McMullen and raised an issue identical to his first point of appeal in the present case. We again hold that no error was committed with regard to admitting Defendant's confession, and we adopt the recitation of facts and our rationale as set out in State v. Gilbert, id., and State v. Gilbert, 99 N.M. 316, 657 P.2d 1165 (1982). See also Oregon v. Bradshaw, ___ U.S. ___, 103 S.Ct. 2830, ___ L.Ed.2d ___ (1983).

Trial Court's Refusal to Instruct the Jury that the Truth of Exculpatory Matter in Defendant's Confession must be Presumed Unless Refuted.

Defendant asserts that parts of the confession admitted into evidence constituted exculpatory matters, the truth of which must be presumed unless refuted by the State. The trial court allowed Defendant's statement to be admitted, but ruled that the State was not bound to accept the truth of the entire statement. By relying on statements indicating that he "suffered from an irresistible urge to rape and kill," Defendant misconceives what constitutes exculpatory evidence. Exculpatory evidence is evidence reasonably tending to negate guilt. State v. Gonzales, 95 N.M. 636, 624 P.2d 1033 (Ct.App.1981). The allegedly exculpatory statements concerning urges suffered by Defendant are inconsistent with other portions of his confession. Furthermore, they constitute neither a complete defense nor sufficient basis to establish an insanity defense. Neither the State nor the jury must accept Defendant's statements or testimony, in view of all the evidence in the case. See State v. Lopez, 79 N.M. 282, 442 P.2d 394 (1968); see also State v. Vigil, 87 N.M. 343, 533 P.2d 578 (1975) (jury not bound to accept Defendant's statements as true). The trial court correctly refused the instruction.

JURY

The "Witherspoon Doctrine" and the Failure to Remove Jurors for Cause.

Defendant contends that the trial court's automatic exclusion for cause of potential jurors based on their views of capital punishment was error. First, such

automatic exclusions violate the equal protection clause of the United States Constitution and the New Mexico Constitution, see U.S. CONST. amend. XIV, § 1; N.M. Const., art. II, § 18, by arbitrarily singling out capital cases as the only cases in which the State is permitted to exclude veniremen on the bases of their views on punishment. Second, because the jury that convicts a defendant also decides his sentence, see NMSA 1978, §§ 31-18-14 through 31-18-21 (Repl.Pamp.1981) (Criminal Sentencing Act), the automatic exclusion of veniremen who are not "death qualified" forces the defendant to face an unrepresentative jury not only for his sentencing but also for determining his guilt or innocence. Third, studies indicate that a "death-qualified" jury is conviction prone.

As Defendant does not contend that any particular juror was improperly disqualified from sitting in this case, we view his argument as a general constitutional attack on the very process of death qualifying. This Court previously has answered adversely to Defendant the issues he raises. State v. Trujillo, 99 N.M. 251, 657 P.2d 107 (1982); see also State v. Hutchinson, 99 N.M. 616, 661 P.2d 1315 (1983).

A review of the record reveals that the trial court in this case correctly followed constitutional and statutory requirements in conducting the death qualification of the jury in defendant's trial. Adams v. Texas, 448 U.S. 38 (1980); Witherspoon v. Illinois, 391 U.S. 510 (1968). Death qualification, properly conducted, is not grounds for reversal. State v. Trujillo.

Trial Court's Failure to Dismiss for Cause a Prospective Juror Who was in Contact with Defendant's Former Father-in-law.

Defendant asserts error by the trial court in refusing his challenge for cause of a venireman who worked with Defendant's former father-in-law at Sandia Laboratories. The venireman described the relationship as strictly casual, and stated that he was not aware of circumstances regarding Defendant's former father-in-law's family. We have reviewed the entire voir dire of this venireman

and find no indication that he would have been less than fair, unbiased, and impartial. The trial court's discretion in excusing a juror for cause is reviewed solely for manifest error or a clear abuse of that discretion. State v. Martinez, 95 N.M. 445, 623 P.2d 565 (1981); State v. Burrus, 38 N.M. 462, 35 P.2d 285 (1934). We do not find that the trial court abused its discretion.

Trial Court's Refusal to Excuse for Cause Two Accepted Jurors.

Defendant asserts that the trial court erred in failing to dismiss two jurors for cause because of the possibility that those two jurors had overheard a conversation between two veniremen in which at least one or both of the two veniremen indicated a belief that Gilbert was guilty. It is uncontested that the trial court questioned the two jurors and that both denied hearing any such conversation. Defendant presented no evidence to indicate that the jurors heard such a conversation. The trial court did not abuse its discretion. See State v. Martinez, 95 N.M. 445, 623 P.2d 565 (1981); State v. Padilla, 91 N.M. 451, 575 P.2d 960 (Ct.App.1978).

Trial Court's Excusal and Subsequent Reseating of a Potential Juror.

Defendant argues that the trial court erred in excusing and subsequently reseating a prospective juror on the final jury selection list. During voir dire, a prospective juror expressed reservations about the death penalty and was then excused for cause. Defendant objected under the Witherspoon doctrine. See Witherspoon v. Illinois, 391 U.S. 510 (1968). Later, the same prospective juror was summoned by the trial court, questioned further and reseated on the final prospective juror list. Defendant objected and now claims that such a procedure could engender confusion in the prospective juror's mind and thereby deny Defendant a fair trial. In final jury selection, regular and alternate jurors were selected before the prospective juror's number was reached.

The trial court explained to the prospective juror why she had been recalled.

The juror received the explanations and admonitions given to all the other prospective jurors. We do not find that the trial court abused its discretion. See State v. Martinez, 95 N.M. 445, 623 P.2d 565 (1981); State v. Padilla.

Trial Court's Dismissal of a Seated Juror.

During the course of the trial the court received information that one of the seated jurors was schizophrenic, suffered from seizures and was under a doctor's care. The trial court informed counsel for both sides, and proceeded to investigate the matter by consultation with the juror's attending physician. The doctor considered the juror to be "flaky" and strongly recommended the juror's recusal as being in the best interest of the juror. The trial court excused the juror and Defendant objected without stating any reasons.

We find neither prejudice to the defendant, nor an abuse of discretion on the part of the trial court. See State v. Padilla; cf. State v. Gallegos, 88 N.M. 487, 542 P.2d 832 (Ct.App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975) (trial court's duty to see that an accused is tried by a properly qualified jury). The trial court did not err in dismissing this juror.

PROCEDURE

Trial Court's Refusal to Quash the Indictment Because of the Nature and Manner of the Presentation of Evidence to the Grand Jury.

Defendant alleges that the District Attorney failed to present certain evidence regarding Defendant's mental state and evidence regarding Defendant's state of intoxication at the grand jury proceedings. Neither transcripts nor tapes of the grand jury proceedings have been included in the appellate record for review by this Court. Defendant has the obligation to ensure that a proper appellate record is provided to this Court for review of alleged errors. State v. Perez, 95 N.M. 262, 620 P.2d 1287 (1980). This Court cannot review matters outside the record. Id.; State v. Smith, 92 N.M. 333, 591 P.2d 664 (1979).

Defendant also alleges prejudicial remarks by the District Attorney at the

grand jury proceedings. Defendant claims that the State improperly referred to the widespread publicity of this case and widened the scope of the grand jury inquiry to include considerations of other alleged homicides, which were not the subject of the present case. Portions of the grand jury proceedings were read into the record by defense counsel and therefore made a part of the appellate record. However, it is apparent from those selected portions that the State was careful to advise the grand jury that they should consider only the question of a crime involving the homicides of Kenn and Noel Johnson. This conduct is not so prejudicial as to vitiate the indictment. Cf. State v. Saiz, 92 N.M. 776, 595 P.2d 414 (Ct.App.1979) (prosecutor's comment to grand jury regarding dismissal of defendant's previous indictment not inherently prejudicial).

Trial Court's Refusal to Compel Election and Refusal to Direct a Verdict Based on Insufficient Evidence to Support the Kidnapping Charges.

Defendant was charged with two counts of kidnapping and two counts of criminal sexual penetration. Defendant asserts that the trial court erred by not requiring the State either to elect between or merge the separate counts of kidnapping and criminal sexual penetration. Defendant further asserts that there was insufficient evidence to establish the offense of kidnapping and that the trial court erred in not directing a verdict on the kidnapping counts.

Although Defendant claims that he moved to sever counts and to compel an election by pretrial motions, the pretrial motions did not raise the questions Defendant now argues. To the extent that Defendant relies upon his motion for a directed verdict on the grounds that there was insufficient evidence to support the kidnapping charges, the transcript of proceedings concerning said motion does not show that the question now raised was raised in the motion for a directed verdict. The question raised in this issue is therefore not properly before this Court. NMSA 1978, Crim., Child.Ct., Dom.Rel. & W/C App.R. 308 (Repl.Pamp. 1983); see NMSA 1978 Crim., Child.Ct., Dom.Rel. & W/C App.R. 301(a)(4)

(Repl.Pamp.1983); State v. Day, 94 N.M. 753, 617 P.2d 142, cert. denied, 449 U.S. 860 (1980).

Trial Court's Denial of Defendant's Request to Exclude Consideration of the Death Penalty as to the Felony Murder Alternatives of the Two Counts of First Degree Murder.

This contention is without merit. In New Mexico a felony murder cannot become a potential death penalty offense unless the felony in question is enumerated in NMSA 1978, Section 31-20A-5 (Repl.Pamp.1981). Defendant engaged upon specific felonies with the concomitant intent to murder the victims toward or at the conclusion of the underlying felonies. § 31-20A-2(B). To claim that he therefore is less culpable, warranting a less severe sanction of the law, is illogical. We find New Mexico's Capital Punishment Statutes, NMSA 1978, Sections 31-20A-1 through 31-20A-6 (Repl.Pamp.1981) to the extent they permit the death penalty to be imposed for felony murder committed in the course of certain specific felonies and with intent to kill in the commission of such felonies, constitutionally sound. Cf. Culberson v. State, 379 So.2d 499 (Miss. 1980), cert. denied, 449 U.S. 986 (1980).

HEARSAY AND PHOTOGRAPHS

Admission of Testimony Regarding Kenn Johnson's Arrest on Charge of Possession of Marijuana.

Defendant asserts that the trial court allowed into evidence testimony that was inadmissible hearsay. On cross-examination of a State witness, Defendant created the impression that Kenn Johnson had a felony conviction. When the State attempted to rebut that implication through the testimony of Johnson's mother, Defendant objected. Mrs. Johnson had begun to relate what she had learned from a telephone conversation with her son about his 1974 arrest. Defendant objected on grounds of hearsay and no personal knowledge. The jury was excused, and proffer was made. The trial court inquired whether the defense had conducted an investigation as to the truth of the 1974 incident. As the defense

had not, the trial court ruled that the information should go to the jury since Defendant had left the impression it was a felony conviction. A defendant cannot be heard to complain on appeal that he was prejudiced by evidence which he introduced into the case. State v. Smith, 92 N.M. 533, 591 P.2d 664 (1979).

Mrs. Johnson then testified concerning the circumstances surrounding the arrest. No specific evidence was adduced as to whether the conviction was a felony or a misdemeanor. On cross-examination Mrs. Johnson acknowledged that Kenn Johnson was convicted for possession of marijuana, but the degree was never specified.

Even assuming arguendo that the trial court erred in permitting Mrs. Johnson to testify concerning the telephone call, Defendant establishes no prejudice to his case. See NMSA 1978, Evid.R. 103(a) (Repl.Pamp.1983); Proper v. Mowry, 90 N.M. 710, 568 P.2d 236 (Ct.App.1977). Error, if any, was harmless beyond any doubt. See State v. Muniz, 95 N.M. 415, 622 P.2d 1035 (1981); State v. Moore, 94 N.M. 503, 612 P.2d 1314 (1980); see also Chapman v. California, 386 U.S. 18 (1967).

Admission Into Evidence of Photographs of the Two Victims.

Defendant complains that the trial court erred in admitting "numerous gory and inflammatory photographs of Kenn and Noel Johnson" despite substantial testimony concerning the crime scene. We have reviewed both the photographs and the related portions of the record and find that the trial court was especially careful to admit only those photographs that served to explain, illustrate, or corroborate the testimony of the witnesses concerning the scene of the crime and the wounds of the victims. Photographs are relevant and admissible for the purpose of clarifying and illustrating testimony. State v. Hutchinson, 99 N.M. 616, 661 P.2d 1315 (1983); State v. Upton, 60 N.M. 205, 290 P.2d 440 (1955). The photographs were properly admitted. State v. Stephens, 93 N.M. 368, 600 P.2d

820 (1979); State v. Noble, 90 N.M. 360, 563 P.2d 1153 (1977); see State v. Garcia, 663 P.2d 60 (Utah 1983).

CHEMICAL TESTING

Trial Court's Denial of the Motion to Dismiss the Charge of Criminal Sexual Penetration or in the Alternative, to Exclude the State's Evidence Relating to Tests Done on a Wooden Spoon.

Defendant claims the trial court erred in failing to exclude evidence of a chemical test for the presence of acid phosphotase on a wooden spoon alleged to have been used by Defendant in the commission of criminal sexual penetration. Defendant claims that because washings from the spoon became contaminated and were discarded, the actual evidence was lost. Defendant argues that he was therefore denied due process and the right to confrontation. The trial court ordered that the defense be allowed to perform independent tests of the spoon, but denied the motion to dismiss or to preclude evidence or testimony relating to the tests performed earlier by the State.

The factors to consider in determining whether deprivation of evidence is reversible error are set forth in State v. Chouinard, 96 N.M. 658, 634 P.2d 680 (1981), in which this Court adopted the three-part test devised earlier in State v. Lovato, 94 N.M. 780, 782, 617 P.2d 169, 171 (Ct.App.1980):

> 1) The State either breached some duty or intentionally deprived the defendant of evidence;
> 2) The improperly 'suppressed' evidence must have been material; and
> 3) The suppression of this evidence prejudiced the defendant.

State v. Chouinard, 96 N.M. at 661, 634 P.2d at 683 (citations omitted).

None of these factors are present here. Any alleged materiality was insignificant when considered against Defendant's confession that he compelled Noel Johnson to penetrate herself sexually with the shaft end of the wooden spoon while he watched. Defendant asserts prejudice, but the mere claim of prejudice is insufficient to establish it. State v. Smith, 92 N.M. 533, 591 P.2d 664 (1979).

We find that the trial court did not err in denying the motion to dismiss or in allowing admission of the State's evidence relating to tests done on the wooden spoon.

Trial Court's Admission of Expert Testimony Regarding Results of Chemical Testing.

An expert witness testified about the chemical testing for acid phosphotase. In response to Defendant's questions on cross-examination, the witness stated that the positive or negative cutoffs were established by statistical data and as such were not opinion but fact. Defendant moved that this testimony be stricken as invading the province of the jury and going to matters beyond the expertise of the witness. The trial court then allowed the State to further question the witness concerning what parts of his testimony were opinion and what parts dealt with facts. The expert testified that the results of the testing were facts, but that what the figures meant was a matter of his expert opinion. On further cross-examination the witness testified as to matters of his opinion. Defendant asserts that the trial court abused its discretion in not striking inadmissible testimony. Defendant further asserts that the trial court neither cautioned the jury nor gave any sort of curative instruction.

The admission of expert testimony or other scientific evidence is within the sound discretion of the trial court and will not be reversed absent a showing of the abuse of that discretion. State v. Chouinard, 96 N.M. 634, 634 P.2d 680 (1981). In this case the State was able to rehabilitate the witness, and we do not see that the court abused its discretion in refusing to strike his testimony. Defendant did not request the trial court to caution the jury or give a curative instruction. The trial court is not to be faulted for failing to do what it has not been asked to do. State v. Martinez, 97 N.M. 316, 639 P.2d 603 (Ct.App.1982); State v. Vallejos, 89 N.M. 23, 546 P.2d 871 (Ct.App.1976).

INSANITY DEFENSE

Trial Court's Denial of Motion for Bifurcation of Defendant's Trial on the Issues of Sanity and Guilt or Innocence.

Defendant advances several reasons why his trial should have been bifurcated. He asserts that the joinder of two phases of the trial prejudiced him by limiting his right to present different, though interlocking defenses. Defendant further argues that a single trial which considers both the guilt or innocence and insanity is a violation of his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article II, Section 18 of the New Mexico Constitution and that it would violate his privilege against self-incrimination under the Fifth Amendment of the United States Constitution and under Article II, Section 15 of the New Mexico Constitution. Defendant contends that the jury could not reasonably be expected to set aside inculpatory material in his statements and his prejudicial prior conduct and limit this to the issue of Defendant's mental state.

The reasons advanced are without merit. There was no proper basis for either an insanity issue or an insanity instruction. Furthermore, Defendant presented no evidence of insanity in his case in chief. The trial court properly followed the applicable Rules of Criminal Procedure. See NMSA 1978, Crim.P.R. 40 (Repl.Pamp.1980).

Trial Court's Failure to Stop the State from Adopting a Position Contrary to that which it Previously had Maintained.

In his opening statement, Defendant claimed that he would establish that he killed Kenn and Noel Johnson in self-defense during an aborted drug transaction. This remained Defendant's theory of the case until the State introduced into evidence Defendant's statements that he was at times seized by an uncontrollable urge to kill and rape. Defendant initially objected to the admission of these statements on the grounds that they constituted evidence of character and were

therefore in violation of the New Mexico Rules of Evidence. See NMSA 1978, Evid.R. 404(a) (Repl.Pamp.1983). The State then took the position that this statement of irresistible urge to rape and kill was admissible as proof of motive and intent. See NMSA 1978, Evid.R. 404(b) (Repl.Pamp.1983). Defendant withdrew his objection to the evidence and subsequently conceded that he suffered from an irresistible urge to rape and kill and that this was the motive for the crime. At this point, Defendant abandoned his self-defense theory. Thereafter, Defendant introduced no evidence tending to establish the defense asserted in his opening statement, and no self-defense instruction was tendered. Defendant now asserts that he relied to his detriment on the position that an irresistible urge to rape and kill was the motive for the crime. Because of this reliance, he abandoned his theory of self-defense.

A review of the record reveals that Defendant abandoned all objections other than those made at pretrial to admission of his statements. This would include the present contention that Defendant was prejudiced by the State's adoption of a position contrary to that which it previously had maintained. Furthermore, Defendant's trial tactics do not provide him a basis for relief in this appeal. State v. Gillihan, 85 N.M. 514, 514 P.2d 33 (1973); see State v. Hutchinson, 99 N.M. 616, 661 P.2d 1315 (1983).

Trial Court's Refusal to Submit the Requested Insanity Instruction to the Jury.

Defendant refers this Court to the following excerpt from his confession, which was admitted into evidence:

> I just "flip out," and when I do, I kill. Then I rape. Thank God it doesn't happen a great deal. But that's just the way it is. I get this urge that's in the adrenalin. I can't stop it. I can't control it. I try.

Based on this statement, Defendant alleges that the trial court erred in failing to instruct the jury on the defense of insanity. Defendant asserts or cites no other

evidence as grounds for the insanity defense. The trial court found no basis in the evidence for an insanity instruction, and we have found none. The trial court's ruling was correct. See State v. Hartley, 90 N.M. 488, 565 P.2d 658 (1977) (setting forth the essential elements of an insanity defense).

CONSTITUTIONALITY OF NEW MEXICO'S CAPITAL PUNISHMENT STATUTES

Defendant challenges the constitutionality of New Mexico's capital punishment statutes, NMSA 1978, Sections 31-20A-1 through 31-20A-6 (Repl.Pamp.1981), on six grounds. The New Mexico Public Defender Department also submitted a brief of amicus curiae challenging the statutes' constitutionality.

A. Defendant first asserts that the capital punishment statutes are unconstitutional because they neither require any specific finding by the jury on mitigating circumstances nor provide any standard by which the jury determines that the aggravating circumstances outweigh the mitigating circumstances. This Court has already decided this issue adverse to Defendant. State v. Garcia, ___ N.M. ___, 664 P.2d 969, cert. denied, ____ U.S. ____, 103 S.Ct. 2464, ___ L.Ed.2d ____ (1983). See Gray v. Lucas, 677 F.2d 1086 (5thCir.1982).

B. Defendant next asserts that the capital punishment statutes impermissibly require him to carry the burden of proof and the risk of nonpersuasion at the sentencing phase of trial. Defendant argues that if the evidence is inconclusive, or if defense counsel does not or cannot present the evidence effectively, the defendant must be put to death. We are not persuaded by Defendant's argument.

Section 31-20A-3 provides for a proceeding in which the jury must specify and unanimously find beyond a reasonable doubt at least one of the aggravating circumstances enumerated in Section 31-20A-5. The jury must also unanimously specify that the sentence of death should be imposed pursuant to Section 31-20A-2. In providing the jury the necessary guidance by which to effectuate the statutes, this Court has promulgated oral and written instructions that apprise the

jury that the burden of establishing the aggravating circumstances remains at all times upon the State. See NMSA 1978, UJI Crim. 39.10, 39.11, 39.14 through 39.20, 39.31, 39.32 (Repl.Pamp.1982); see also State v. Garcia.

Defendant does not contend that the instructions as given were improper in any particular. Rather, Defendant asserts the constitutional invalidity of the New Mexico capital punishment statutes on the grounds that this law requires him to assume the burden of proof and the risk of non-persuasion. Defendant's contention that if he presents no mitigating circumstances or presents them poorly, this essentially condemns him to a mandatory death is without merit. Both the burden of proof and the burden of final persuasion rest squarely upon the State. See Gray v. Lucas.

C. We have considered Defendant's claim that the jury has unlimited and unrestrained discretion during the sentencing phase of the trial. We find his argument without merit. Under New Mexico's statutes, a defendant is afforded substantial constitutional safeguards by the limitation on the aggravating circumstances as set forth in Section 31-20A-5, and the virtually unlimited mitigating circumstances provided for in Section 31-20A-6. See Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

D. Defendant claims that the New Mexico statutes are unconstitutional because the provisions requiring a bifurcated trial on the issues of guilt and sentencing operate to deny due process of law and equal protection. In essence, Defendant claims that once the jury had convicted him of the criminal offenses, the jury was biased and was not able fairly and impartially to weigh the evidence for and against the death penalty.

The legislative mandate is that "all evidence admitted at the trial shall be considered and additional evidence may be presented as to the circumstances of the crime and as to any aggravating or mitigating circumstances." NMSA 1978, §

31-20A-1(C) (Repl.Pamp.1981). Indeed, liberal admission of evidence for consideration by the sentencing authority is necessary for a just result. As the United States Supreme Court has stated, "[w]e think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision." Gregg v. Georgia, 428 U.S. 153, 204 (1976) (citation omitted). Firsthand observation of the evidence adduced at trial provides the jury with the best information possible to make the weighty decisions involved in both guilt determination and sentencing. The bifurcated trial to one jury does not offend constitutional principles. Cf. People v. Lewis, 88 Ill.2d 129, 58 Ill.Dec. 895, 430 N.E.2d 1346 (1981).

E. Defendant claims that the mitigating circumstances relating to a defendant's having "no significant history of prior criminal activity," NMSA 1978, § 31-20A-6(A) (Repl.Pamp.1981), is unconstitutionally vague and indefinite. Amicus argues that arbitrary and capricious sentencing will occur because this mitigating circumstance fails in objectivity. We disagree. We are not persuaded that the wording is vague and indefinite as to render Section 31-20A-6(A) unconstitutional. As the Supreme Court of Florida stated in answer to a similar contention, "[a]s to what is significant criminal activity an average man can easily look at a defendant's record, weigh traffic offenses on the one hand and armed robberies on the other, and determine which represents significant prior criminal activity." State v. Dixon, 283 So.2d 1, 9 (Fla.1973); see also People v. Lewis, 430 N.E.2d 1346 (1981); State v. Holtan, 197 Neb. 544, 250 N.W.2d 876 (1977).

F. We previously discussed Defendant's final challenge to New Mexico's capital felony sentencing act in State v. Garcia. In that case we held that the death penalty in and of itself, does not violate federal or state constitutional mandates against cruel and unusual punishment.

PROPORTIONALITY REVIEW

Although it was not raised as an issue on appeal, we have reviewed Defendant's case on the grounds of excessive or disproportionate punishment, following the guidelines set forth by this Court in State v. Garcia, ___ N.M. ___, 664 P.2d 969, cert. denied, ___ U.S. ___, 103 S.Ct. 2464, ___ L.Ed.2d ___ (1983). In comparing this case with State v. Hutchinson, 99 N.M. 616, 661 P.2d 1315 (1983) and State v. Simonson, S.Ct. No. 14, 637 (Filed September 23, 1983), we find that Defendant's sentence of death for the murders of Kenn and Noel Johnson was neither excessive nor disproportionate.

The judgment of the jury is therefore affirmed. This case is remanded to the trial court to set the date of execution which must be not less than sixty nor more than ninety days from the date of this mandate on the judgment pursuant to NMSA 1978, Section 31-14-1.

IT IS SO ORDERED.

HOWARD E. STOWERS, JR., Justice

WE CONCUR:

H. VERN PAYNE, Chief Justice

WILLIAM R. FEDERICI, Justice

WILLIAM RIORDAN, Justice

DAN SOSA, JR., Senior Justice,
specially concurring on all issues except the issue of the imposition of death.

SPECIALLY CONCURRING OPINION
ON ALL ISSUES EXCEPT THE ISSUE
OF THE IMPOSITION OF DEATH

SOSA, Senior Justice.

I concur with the affirmance of the defendant's convictions for the reasons stated in the majority opinion. However, I respectfully dissent on the issue of the imposition of the death sentence. I would hold that New Mexico's death penalty statute is unconstitutional and would remand this cause for the imposition of a sentence of life imprisonment for the reasons stated in my specially concurring opinion in State v. Garcia, ___N.M.___, 664 P.2d 969, cert. denied, ___U.S.___, 103 S.Ct. 2464, ___L.Ed.2d___(1983).

DAN SOSA, JR., Senior Justice

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

WILLIAM WAYNE GILBERT,

Petitioner,

vs. No.

STATE OF NEW MEXICO,

Respondent.

APPENDIX B

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

WILLIAM WAYNE GILBERT,

Petitioner,

vs.

STATE OF NEW MEXICO,

Respondent.

No. 83-5943

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The undersigned attorney, on behalf of the petitioner in this case, hereby moves that William Wayne Gilbert be allowed to proceed in forma pauperis before this Court. The reasons are set forth in the attached affidavit.

Respectfully submitted,

S. THOMAS SULLIVAN
Appellate Defender

New Mexico Public Defender Department
Appellate Division
215 West San Francisco Street
Santa Fe, New Mexico 87501
(505) 827-3905

Counsel for Petitioner

83-5953

Plaintiff,

vs. No. 31317 Criminal

Defendant.

The office of the Public Defender, Second Judicial District, hereby enters its appearance as counsel for the Defendant in this cause.

Respectfully submitted,

By

Suite 500

I hereby certify that a copy of the foregoing was placed in the District Attorney's basket and mailed to other counsel of record on April 2, 1984.

Attorney for Defendant

2-7

Best Copy Available

EXHIBIT A

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

WILLIAM WAYNE GILBERT,

Petitioner,

vs. No. 83-5953

STATE OF NEW MEXICO,

Respondent.

A F F I D A V I T

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

I, William Wayne Gilbert, being first duly sworn according to law, depose and say in support of my motion for leave to proceed in forma pauperis:

1. I am the petitioner in this case.

2. Because of my poverty, I am unable to pay the costs of this proceeding or to give security therefor.

3. My appeal in the New Mexico courts was prosecuted in forma pauperis on order of the trial court appointing the Public Defender Department to represent me. (See attached order)

4. I believe that I entitled to legal redress in this case.

WILLIAM WAYNE GILBERT

SUBSCRIBED AND SWORN to before me this 14th day of December, 1983.

Notary Public

OFFICIAL SEAL
[illegible]
NOTARY PUBLIC - STATE OF NEW MEXICO
My Commission Expires 12-10-87

My Commission Expires:

_____

STATE OF NEW MEXICO COUNTY OF BERNALILLO

*

IN THE DISTRICT COURT

STATE OF NEW MEXICO,

Plaintiff,

vs No 32827 - Criminal

WILLIAM WAYNE GILBERT,

Defendant

ORDER ON MOTION TO SUPPRESS
ORAL OR WRITTEN STATEMENTS OF THE DEFENDANT
AND THE SEARCH OF DEFENDANT'S PREMISES
PURSUANT TO THE CONSENT TO SEARCH

The Court has reviewed the testimony of the witnesses, exhibits, listened to the taped statement of the defendant and the supplemental report on tape of Richard Ness, reviewed the briefs of the attorneys and the cases cited therein, and finds as follows:

1. During the morning hours of Friday, January 18, 1980, the bodies of Ken and Noel Johnson were discovered in their residence, and Detective Richard Ness was dispatched to their home. After arrival and inspection of the bodies, Detective Paul Jasler was assigned to investigate the deaths.

2. The same evening a shooting incident occurred at about 10:00 p.m. at the American Sandwich Shop in which a man in army camouflage fatigues reportedly shot at the restaurant manager with a rifle and left the scene.

3. At the 10:30 p.m. briefing at Albuquerque Police Department, Officer Kenneth Fisher was told of the Sandwich Shop incident. Later that evening Fisher with Officer Clingenpeel were on patrol and were dispatched to an area near a water tower by Four Hills where a car was reported to be flashing its tail lights.

4. Fisher and Clingenpeel located the vehicle on a steep lonely hill on the mesa. They parked their vehicle about thirty yards away, and as they approached the car, they noticed that the car was similar to the one described at briefing. A man alighted from the car and said "he was glad to see us." Clingenpeel approached the vehicle on the left side and noticed a rifle in the car and said, "This is the guy - there's the gun." Defendant was then patted down, rounds of ammunition were found in his jacket, and he was told that he was under arrest for Aggravated Battery at the American Sandwich Shop.

5. The defendant was escorted to the officers' patrol vehicle. He was able to walk all right even though the hill was steep. The officers noted a moderate odor of alcohol on the defendant. On the way to the patrol car the defendant said "he was cold, and he had tried to flag down the security guards at Manzano Air Force Base."

6. Clingenpeel sat on the driver's side of the patrol car, Fisher on the passenger side, and defendant in the back seat. At this time Fisher read defendant the Miranda warnings off of the card that he carries for that purpose, and defendant said that "he understood his rights" and "I believe I would

like to wait until I talk to a lawyer." Defendant then commented, not in a response to any question, "that he had fired his gun to get attention, and had put SOS with his tail lights while on the hill to get attention." Defendant was then asked why he shot up the Sandwich Shop, and replied "because I got a bad sandwich." Defendant was then asked where his fatigues were, and replied "back in the car."

7. Fisher went back to the defendant's car and searched the area around the car, and then returned to the patrol unit. The officers then proceeded to take defendant to the police station. On the way defendant asked Clingenpeel for a cigarette and was given one. Clingenpeel then asked defendant "why he had done it?" (Sandwich Shop incident), "did you have a fight with your wife?" Defendant said "She's out of town."

8. Officer Clingenpeel took Defendant to the Albuquerque Police Station about 6:20 a.m. and explained the advise of rights and waiver of rights form to defendant. Defendant said he understood his rights, read the form aloud to Clingenpeel, initialed the form alongside his enumerated rights, said he would waive his right to counsel and talk about the American Sandwich Shop incident. Defendant signed the advise of rights and waiver of rights form which is State's Exhibit 1, and proceeded to give a written statement (State's Exhibit 2) relating to the Sandwich Shop incident. Defendant signed the statement in front of Clingenpeel and the stenographer.

9. After execution of the statement Clingenpeel again asked Defendant if he had a fight with his wife and Defendant responded "she's out of town." Clingenpeel then inquired if

Defendant had anything else on his mind and Defendant responded "that he was planning to leave - to go down the freeway to get police officers' attention - planning to exit with a rifle - wish they would shoot him" or words to that effect.

10. During the time interval between Defendant's arrest and completion of his written statement at about 6:30 a.m. on January 19, 1980, Defendant appeared to Clingenpeel to be calm, cooperative, coordinated, and, except for a minor odor of alcohol, not under the influence of alcohol. Defendant was booked into the Bernalillo County Detention Center at 7:28 a.m. on the charges of Attempted Armed Robbery and Aggravated Battery. Clingenpeel discussed Defendant's bond rights with him at that time.

11. The statement given to Officer Clingenpeel and admitted as State's Exhibit 2 reflects that at the time of its execution Defendant was coherent, oriented as to time and place, had the ability to accurately recall past events, was not under any compulsion, and was acting in what he felt to be his best interests.

12. On January 19, 1980, at about 8:30 a.m. the Defendant called Eloy Duran, a local bondsman, and tried to make arrangements for his release. He sounded coherent, intelligent and normal to Mr. Duran, and gave Duran detailed information concerning his assets and ability to pay the bond fee.

13. During the 18th of January, 1980, the police had developed the name of the defendant as a possible suspect in the Johnson murders. An identification of the Defendant had been made placing the Defendant at the Johnson home the evening the Johnsons were killed.

14. On the morning of the 19th, Officer Jasler was informed of Defendant's arrest the previous evening in connection with the Sandwich Shop incident. At 10:30 a.m. on the 19th, Jasler and Sgt. Richard Ness went to the Bernalillo County Detention Center, and removed Defendant to the Albuquerque Police Department to interview him about the Johnson murders. Defendant's physical and mental condition appeared normal. Sgt. Ness read Defendant his Miranda rights again, and Defendant said he understood them. Defendant was asked if he knew the Johnsons, and he replied that he had seen them about a week ago. The police then told Defendant of the murder, and asked his whereabouts on the night of January 17th (murder night). Defendant replied "that he had been at home,no, with his wife at Luna Mansion." During this conversation, the defendant had been under the impression that he was going to be questioned about the Sandwich Shop incident. When he realized that he was being questioned about the Johnson murders, he told the officers "that he had better talk to an attorney."

15. Jasler and Ness ceased questioning the defendant at this time, and they allowed the Defendant to use a telephone to contact an attorney. Defendant tried to call several different lawyers, and finally made contact with Attorney James Brandenburg's answering service. Brandenburg returned the call to the Defendant in a short time and talked with the defendant. Brandenburg also talked to Sgt. Ness during this same conversation. Ness told Brandenburg that Defendant had been arrested on the Sandwich Shop incident, and he was seventy percent (70%) sure that Defendant was involved in the Johnson murders. Brandenburg had already been

told by Defendant that he was being questioned about the Johnson murders, and Brandenburg told Defendant not to talk to the police or anyone else about the Johnsons. Ness told Brandenburg that they were taking Defendant back to Jail, but that they wanted to take Defendant's photos, fingerprints, and fingernail scrapings first. Brandenburg agreed to this. Defendant sounded coherent, articulate and intelligent to Brandenburg, and Defendant seemed to understand Brandenburg's directions not to talk to anyone.

16. Brandenburg was apparently under the impression from Defendant that he could bond out, and so he told Defendant to come in to see him at his office on Monday morning. Jasler and Ness did not question Defendant any further at this time, but took him to another room to wait for David Ramirez, of the Criminalistics Division, to take the photos, prints, and scrapings.

17. While waiting for Ramirez, Jasler and Defendant engaged in idle conversation. Jasler did not know that Defendant's wife was dead, and Defendant stated that his wife did not know of his arrest, because she was out of town until Sunday.

18. David Ramirez arrived about one-half hour later to take the photos and prints. Ramirez had not been told that Defendant was a suspect in the Johnson murders. Defendant initiated the conversation with Ramirez by asking him about his work, fingerprinting, etc. Ramirez told Defendant about being at the Johnson murder scene. Defendant asked how they had been killed, and Ramirez replied that they had been shot. The defendant

commented "how tacky." They also discussed whether Defendant could bond out. The defendant appeared normal to Ramirez, and not under the influence of any drugs or alcohol. Defendant spoke clearly, and Ramirez did not notice anything unusual about Defendant's condition.

19. Ramirez returned Defendant to Jasler, who, in the meantime, had found out about Carol Gilbert's death. Jasler told Defendant of his wife's death, and Defendant appeared depressed. Ness and Jasler were taking Defendant back to the Jail, and Ness said, "the ball game's up, you're going to have to do something." Defendant responded, "come back in an hour and I'll talk to you." Defendant was then booked back into Jail about 1:30 p.m. From 10:30 a.m. until 1:30 p.m. Defendant appeared normal, coherent, understanding, and not under the influence of alcohol or drugs to Jasler, Ness, and Ramirez. Defendant had been offered food during this period, but refused food, and only accepted several cups of coffee.

20. About 2:30 p.m. Jasler and Ness went back to the Jail and took Defendant to an interview room. Ness went into the room with Defendant, and Defendant stated that before he talked, he'd better call Brandenburg and tell him. Ness responded, "There's the phone." Defendant said, "Maybe not, he'll just tell me not to say anything." Ness, "That's right." Defendant then stated to Ness that he had killed two other persons and buried them. Ness decided that it would be better to continue the interview at the police station, so they all left.

21. At the police station, there was further conversation about Defendant calling Brandenburg, and Ness told him to go ahead and use the phone if he wanted to. Defendant responded again to the affect that "Brandenburg will just tell me to keep my mouth shut."

22. The interview with Defendant ensued. Ness wanted to tape the interview and Defendant refused. The Defendant confessed to the murders of the Johnsons, Barbara McMullan, and Carol Gilbert. After completion of the first interview, Ness told Defendant he would like to tape another statement and Defendant agreed. In between the two statements Ness ordered sandwiches for the defendant, which defendant ate. The second statement is on tape and has been admitted as State's Exhibit 5.

23. In the beginning of the taped statement, Defendant acknowledges that he has talked to his attorney Jim Brandenburg who advised him of his rights, that Ness has advised him of his rights, and that Defendant asked Ness to come over and talk to him in the Jail. A listening to the tape reveals Defendant has a good recall of the previous several days' events, intelligent word usage by Defendant, no obvious indication of Defendant being under the influence of alcohol or other drugs, good orientation as to time and place of events, and no indication of coercion by police or unwillingness of defendant to be interrogated. The taped statement appears to be freely and voluntarily given.

24. In the evening about 6:00 p.m. on the same day and when it was dark, the Defendant accompanied Ness, Jasler and Detective Last south of town near the Albuquerque Police Department

firing range, back in the hills near an arroyo, where Defendant points out the body of Barbara McMullan. At the scene Defendant asked "if she was decomposed yet?" Last replied "that she didn't look decomposed." Defendant was then returned to the Jail.

25. Later that evening Ness called Brandenburg and told him of the days' events.

26. On Monday the 21st of January, the Defendant had agreed to take the detectives to the arrest scene to look for the 38 caliber rifle he had hid. Jasler again read Defendant his Miranda rights from the card and went to the arrest scene, but were unable to find the rifle. They returned to the police station. Defendant had told Jasler that the gun used to kill the Johnsons, a 357 Magnum, was in his house at Los Lunas.

27. On Monday morning, January 21st, Officers Jasler and Ness told Defendant that they intended to get a search warrant to search his house in Los Lunas for the 357 Magnum used to kill the Johnsons and the electrical cord used to strangle Barbara McMullan. The defendant said that he would sign a consent to search, if he could go along. He said he didn't want the police to tear up his house. Ness saw Defendant read the consent, which is State's Exhibit 4, and saw the Defendant sign it. At the time of signing, Defendant appeared cooperative, not depressed, and eager to go with the police. The Defendant accompanied officers to his residence and found the 357 Magnum and electrical cord used to kill Barbara McMullan for them.

28. Evidence has been introduced by persons who saw the Defendant on January 17, 18, 19 and 20th, and they give varying accounts as to their observations and opinions of Defendant's physical or mental condition at different times, i.e. tired, depressed, didn't seem normal, wouldn't talk, buzzy, nervous, confused, although the same witnesses testified that the Defendant during those days was coherent, cooperative, docile, agreeable, not violent, speech and actions okay, "like he had a few drinks or something."

29. Evidence has also been introduced establishing that Defendant had several prescriptions filled for Valium, Dalmane, and Diazepam (Valium), and that the drugs were consumed by Defendant between January 15th and his arrest during the early morning hours of January 19, 1980.

30. Conflicting psychiatric and psychological opinion testimony has been introduced by the State and Defendant as to whether or not the Defendant was suffering from an amphetamine or other toxic psychosis, and whether he was so under the influence of alcohol or drugs in any manner so as to impair his cognitive functions or judgment to the extent that his oral, written or taped statements were not the product of a rational intellect and free will, and therefore involuntary. The Court finds that the State's evidence in this regard to the effect that Defendant's judgment and cognitive functions were not so impaired is more persuasive and entitled to greater weight and credibility than the evidence of the Defendant.

31. The Court has concluded and further finds by a clear preponderance of the evidence and based upon the totality of circumstances that

a. the defendant was not suffering from an amphetamine or other toxic psychoses at the time he made oral, taped, or written statements to the police; when he accompanied officers to Barbara McMullan's body; when he executed the consent to search; and when he accompanied officers to his home.

b. during this same period, Defendant's cognitive functions and his judgment were not impaired by the use of alcohol or other drugs, and that he had the mental capacity to be conscious of what he was doing, to retain memory of his actions, and to relate with reasonable accuracy the details of his actions.

c. defendant was read his Miranda rights by Officer Fisher in the patrol car at the scene of his arrest, before giving the written statement to Clingenpeel, by Sgt. Hess before his interview on Saturday morning (19th), and on January 21st by Gasler before looking for the rifle. The Defendant had the mental capacity to, and did understand his Miranda rights at all times.

d. the statements made by the defendant, and the execution of the consent to search, were the product of a rational intellect and a free will by the defendant.

e. the defendant after having asserted his right to remain silent and to consult his attorney while in the patrol car, knowingly, voluntarily, with a rational intellect and of his own free will waived his right to remain silent and to consult with an attorney when he gave the written statement to Officer Clingenpeel.

f. the defendant after having re-asserted his right to remain silent and requesting the right to contact an attorney when being questioned by Sgt. Hess on Saturday morning, did, at approximately 1:30 p.m. and thereafter, voluntarily, knowingly, and of his own free will and with a rational intellect, waive his right to remain silent and his right to assistance of counsel, and did freely and without coercion by the police officers, voluntarily consent to the giving of the oral and taped statements to Sgt. Hess.

g. the defendant voluntarily, and as a product of a rational intellect and free will, executed the consent to search form and consented to the search of his residence in Los Lunas on January 31, 1981, knowing that he had a right to refuse to consent to the search, accompanied officers to the arrest scene to search for the rifle, to the location of Barbara McMullan's body, and to his residence at Los Lunas.

h. at no time was Defendant's will overborne by the authorities.

i. the only statements that should be suppressed were made in the patrol car to Officer Clingenpeel after Defendant said that "he believed he would like to wait until I talk to a lawyer." Clingenpeel then asked Defendant "Why he shot up the Sandwich Shop?", "Where were the camouflage fatigues?", "Why did he do it?", and "Did he have a fight with his wife?" Defendant's answers given in the patrol car should be suppressed.

j. Certain of the oral statements made by the Defendant were not in response to interrogation by the police, but were made by Defendant as a volunteer and should not be suppressed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motion to Suppress Oral or Written Statements be, and the same is hereby denied, except for the statements given to Officer Clingenpeel set out in sub-paragraph (i) above, and it is further

ORDERED, ADJUDGED AND DECREED that the Motion to Suppress Evidence resulting from the Search of Defendant's Residence pursuant to the consent to search is hereby denied.

Richard B. Travis

RICHARD B. TRAVIS, District Judge
Division II, Second Judicial District